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In The

Supreme Court of the United States

October Term, 1974

No. 74-3891

ALBEMARLE PAPER COMPANY, ET AL.,
Petitioners,

v.

JOSEPH P. MOODY, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Albemarle Paper Company (a Virginia corporation), Ethyl Corporation (a Virginia corporation), Albemarle Paper Company (a Delaware corporation) and Hoerner Waldorf Corporation (a Delaware corporation) respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on February 20, 1973.

OPINIONS BELOW

The final opinion and order of the District Court for the Eastern District of North Carolina (App. A of Petition) is reported at 4 FEP Cases 561. The opinion of the

United States Court of Appeals for the Fourth Circuit (App. B of Petition) is reported at 474 F.2d 134.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on February 20, 1973. A timely petition for rehearing *en banc* was granted on June 25, 1973. After briefing to and oral argument before the *en banc* court, a question of appellate procedure was certified to this Court by the Court of Appeals on December 6, 1973. The opinion of this Court on the question certified was delivered on June 17, 1974. Pursuant thereto, the Court of Appeals, on July 22, 1974, vacated its earlier order granting the petition for rehearing *en banc* and denied Petitioner's petition for rehearing. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether this Court should resolve a conflict among the Circuits as to whether, in cases under Title VII of the Civil Rights Act of 1964, the District Courts have traditional equitable discretion to determine whether back pay is an appropriate remedy.

2. Whether a class action for back pay under Rule 23 of the Federal Rules of Civil Procedure is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII, particularly as to class members who did not file a prior written complaint with the Equal Employment Opportunity Commission.

3. Whether the decision below misconstrues this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, in a manner which effectively precludes the use of job-validated

employment testing and nullifies the Congressional intent reflected in 42 U.S.C. § 2000e-2(h).

4. Whether the decision below, in ordering the entry of specific injunctive relief against Petitioners' use of testing, improperly usurps the power of the District Court on remand.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions, 42 U.S.C. § 2000e-2(a), 42 U.S.C. § 2000e-2(e), 42 U.S.C. § 2000e-5(g) and 42 U.S.C. § 2000e-2(h), are set out in Appendix C. The Equal Employment Opportunity Commission ("EEOC") guidelines on employee selection procedures appear at 29 CFR § 1607.

STATEMENT OF THE CASE

On August 25, 1966,[1] four black employees of Petitioner's Roanoke Rapids, North Carolina pulp and paper mill brought this private class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e *et seq.*, ("Title VII") against Albemarle Paper Company ("Albemarle-Virginia"), a Virginia corporation[2] and Halifax

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[1] The employer was first advised of the fact that it had been charged with discriminatory conduct on August 11, 1966, at which time it was served with the Respondents' charges and was given until August 26, 1966, to respond to the charges. Thus, the complaint herein was filed, pursuant to then applicable procedural requirements, before the employer was afforded any opportunity for conciliation.

[2] Albemarle-Virginia is a subsidiary of Ethyl Corporation. In 1968 the assets of Albemarle-Virginia were sold to Albemarle Paper Company ("Albemarle-Delaware"), a Delaware corporation and a subsidiary of Hoerner Waldorf Corporation. Ethyl Corporation, Albemarle-Delaware and Hoerner Waldorf Corporation were added as parties defendant in 1970. The interests of the corporate defendants coincide on the issues raised herein and they are jointly referred to as "Petitioners." For convenience, the term "Petitioner" is used in referring to the employer of Respondents.

Local No. 425, United Papermakers and Paperworkers, AFL-CIO (the "Union"). The complaint alleged various racially discriminatory practices at the mill, including the implementation of a discriminatory seniority system embodied in the collective bargaining agreement. Over Petitioner's objection, Respondents were allowed to proceed as representatives of a broad class of black employees who did not file written complaints with the EEOC prior to commencement of this action. 271 F.Supp 27.

The Roanoke Rapids mill commenced operations in 1907, but it was not until the 1950's that mechanization and the addition of modern paper machines converted the facility into a sophisticated and complex paper mill. Like all paper mills, the Roanoke Rapids mill has been organized on a departmental basis,[3] and the seniority provisions of Petitioner's collective bargaining agreements with the Union have reflected this departmental structure.

Modernization of the Roanoke Rapids mill created the need for a more highly skilled work force. To meet this need, in about 1956, Petitioner instituted a personnel screening program for use in the selection of employees for jobs created by the installation of new machinery. As part of this program, Petitioner made successful completion of certain ability tests a prerequisite for entry into certain skilled lines of progression.[4]

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[3] Each department is organized into one or more lines of progression into which employees can enter and move up into more demanding jobs as vacancies occur, on the basis of seniority, ability and experience. Entry into a departmental line of progression is generally from the Extra Board, introduced for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression.

[4] The Revised Beta test, a professionally developed non-verbal test designed to measure the intelligence of illiterates, was adopted in 1956. Thereafter, in 1963, Petitioner also began using as a requirement for entry into certain skilled lines of progression the Wonderlic test, Series A and B, professionally developed and widely used tests of verbal skills.

Since the passage of Title VII, Petitioner has taken many steps to insure that its employment practices comply with federal law. Among other things, significant changes were made in the seniority system embodied in Petitioner's collective bargaining agreement. In the 1968 contract, Petitioner and the Union eliminated rigid departmental seniority and adopted a form of plant-wide seniority.[5] Then, in 1971, prior to trial, Petitioner and the Union advised the District Court that they had no objection to the entry of a decree permitting black employees to use "plant seniority" for the purpose of advancement. The substance of the proffered decree was adopted by the District Court.

Petitioner also took steps to insure that its use of tests was in conformity with the law. After this Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), Petitioner retained an expert to conduct a validation study. This study showed a positive correlation between test results and performance on the job.[6]

Until 1970 this action was one seeking exclusively class-wide injunctive relief, with Respondents having expressly abandoned any claim for class-wide back pay in order to insure qualification of the case as a class action. Nevertheless, in 1970 Respondents asserted that they were in

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[5] The 1968 contract afforded a transferring employee seniority in the new department equal to that held in his last job. The 1968 contract also granted "red circle rates," whereby a transferring employee would be entitled to the pay rate of the job from which he transferred until he moved high enough in the new line of progression to reach an equal pay level.

[6] The study was conducted by use of the "concurrent validation" method. Petitioner's expert selected, on the basis of his analysis and knowledge of the nature and content of the jobs, ten skill-related job groupings as typical of jobs in the skilled lines of progression. Each employee in each group was rated in comparison with each other employee in the group to obtain a ranking of job performance and statistical correlation was performed to determine correlation between job performance and test results.

fact seeking both injunctive and back pay relief on behalf of the class.

After trial in July and August 1971, the District Court issued its Memorandum Opinion and Order. The District Court entered a decree providing for the type of modification of the seniority system which had been consented to by Petitioner prior to trial.

But the District Court rejected the charge that Petitioner's use of the Revised Beta and Wonderlic tests in certain skilled lines of progression violated Title VII,[7] and the District Court, expressly exercising its discretion as to the appropriate remedy, ruled that the members of the Respondent class were not entitled to back pay.

A panel consisting of two senior judges (Bryan, J. and Boreman, J.) and one regular judge (Craven, J.) reversed the District Court on both the testing and back pay issues. As to each issue, the decision was divided, with a different combination of the panel providing the necessary 2-1 majority. Thus, two circuit court judges held that Petitioner had violated Title VII by using the tests, and a different majority also reversed the District Court in its denial of back pay.

Following the panel's decision, the Fourth Circuit granted Petitioner's request for a rehearing *en banc*. Supplemental briefs were filed by the parties and oral argument was held before the *en banc* court. Thereafter, upon certification of the question by the Fourth Circuit, this Court held that the two senior judges who were members of the initial panel could not properly vote to grant rehearing *en banc*. There-

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[7] The District Court also found that, since "the personnel tests alone are adequate to measure the mental ability and reading skills required for job classification," the high school education requirement was non-essential and would be prohibited. It should be noted, however, that this requirement had been waived since 1965 as to all incumbent employees hired prior to July 2, 1965.

after, the Fourth Circuit vacated its order granting the rehearing, thereby reinstating the divided decision of the original three-judge panel.

REASONS FOR GRANTING THE WRIT

The Decision Below Regarding Back Pay Conflicts With The Decisions Of Other Courts Of Appeals, And Raises Critical Questions Concerning The Remedial Provisions Of Title VII.

Title VII provides that if the District Court finds that an employer has intentionally engaged in an unlawful employment practice, it "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay." Section 706(g), 42 U.S.C. § 2000e-5(g). This case presents fundamental questions concerning the back pay remedy, as to which there has been a conflicting array of decisions by the various Courts of Appeals.

1. The grant of remedial authority in Section 706(g) is inherently equitable in nature and the question of back pay is expressly left to the discretion of the district court. The statutory directive is that the district court, upon finding a Title VII violation "*may* enjoin the . . . practice, and order such affirmative relief as *may* be appropriate, which *may* include . . . reinstatement . . . *with or without back pay.*"

In distinguishing between Title VII and Title VIII actions on the question whether a jury trial is mandatory, this Court has observed that, "In Title VII cases, also, the courts have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge." *Curtis* v. *Loether,* 39 L.Ed. 260, 268 (1974). Peti-

tioner submits that this observation is the only correct interpretation of the Congressional intent underlying Section 706(g).

The decision below virtually eliminates the trial court's discretion to fashion appropriate relief under Section 706(g), for the Fourth Circuit panel held that a District Court must award back pay "unless special circumstances would render such an award unjust."[8]

Other Circuit Court decisions have applied a conflicting standard, affirming trial court back pay denials in the absence of an abuse of discretion measured by traditional equitable standards. *See Manning* v. *International Union,* 466 F.2d 812, 816 (6th Cir. 1972), *cert. denied,* 410 U.S. 946 (1973); *Schaeffer* v. *Yellow Cabs, Inc.,* 462 F.2d 1002, 1006-1008 (9th Cir. 1972); *U. S.* v. *N. L. Industries, Inc.,* 479 F.2d 354 (8th Cir. 1973). And the Third Circuit in *Kober* v. *Westinghouse Elec. Corp.,* 480 F.2d 240, 246-47 (3rd Cir. 1973), recently considered both lines of cases and expressly rejected the Fourth Circuit's "special circumstances" rule.[9]

The "special circumstances" rule derives from *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968),

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[8] A panel of the Fifth Circuit has since adopted the "special circumstances" standard in *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 252-253 (1974), which appears to be the only other case where a *discretionary* denial of back pay was reversed on appeal. Similarly restrictive standards were set forth in *Head* v. *Timken Roller Bearing Co.,* 486 F.2d 870, 876 (6th Cir. 1973) (only "exceptional circumstances" warrant back pay denial); and in *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1375 (5th Cir. 1974) (plaintiffs "presumptively entitled" to back pay).

[9] There is also evidence of a conflict within the Fourth Circuit. In its prior certification to this Court in this proceeding the Fourth Circuit stated:

> "If the *en banc* court reaches the merits, the tentative vote is that it will modify the panel decision with respect to an award of back pay."

dealing with the grant of attorneys' fees to successful plaintiffs in Title II cases. However, far more complex equitable factors affect the question whether back pay is an appropriate remedy in a Title VII action. *See, e.g., United States* v. *St. Louis & S.F. Ry.*, 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied,* 409 U.S. 1116 (1973); *United States* v. *United States Steel Corp.*, 371 F. Supp. 1045 (N.D. Ala. 1973). And a rule which makes an award of back pay flow almost automatically from any finding of an unlawful employment practice is likely to inhibit conciliation and to discourage the prompt resolution of disputes through the entry of injunctive relief by consent (as occurred with respect to the seniority issues in this case), all in contravention of the basic policies underlying Title VII.

The question of when back pay should be awarded in Title VII actions is of widespread and compelling significance. Ignoring the plain language of Section 706(g), the Fourth Circuit has sharply curtailed the discretionary power of the District Court to fashion appropriate relief. The circuits are in conflict and this important issue should be resolved by this Court.

2. The extent to which the decision below emasculates the District Court's remedial discretion in Title VII cases is graphically illustrated by the manner in which the panel majority categorically rejected the special circumstances found by the Distrit Court to justify the denial of back pay. First, the Fourth Circuit panel ruled that Petitioner's good faith was totally irrelevant to the question of back pay. While no court has apparently denied back pay solely because of defendant's good faith, a number of courts have relied upon defendant's good faith as a relevant factor in denying back pay. *See Kober* v. *Westinghouse Elec. Corp., supra; United States* v. *St. Louis & S.F. Ry., supra; United States* v. *N. L. Industries, Inc., supra.*

Second, the Fourth Circuit panel rejected the District Court's finding that Petitioner was prejudiced by Respondents' tardy claim for back pay, which came four years after the action was commenced, and after the Roanoke Rapids mill had been acquired by Albemarle-Delaware on the assumption that this action only involved a claim for injunctive relief.[10] The panel majority reasoned that the Petitioner's defenses are the same whether or not back pay is an issue. But that overlooks the real prejudice to Petitioner. Had Petitioner been put on notice that back pay claims were involved, it may not have allowed Respondents to delay more than five years in bringing this case on for trial, thereby compounding its back pay exposure. Further, had Respondents made known their back pay claims in a timely manner, Petitioner and the Union could have sought court sanction for the changes they voluntarily and unilaterally made in the seniority system in 1968, so as to limit their potential back pay exposure. Finally, Petitioner is clearly prejudiced if back pay is allowed to the entire class after Respondents had earlier used the absence of such claims as justification for allowing the litigation to proceed as a class action. In this situation, even if the "special circumstances" rule is generally appropriate, the District Court was well

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[10] It was not merely that this issue had not specifically been raised. Rather, Respondents had specifically and categorically represented that they were not seeking back pay. In an effort to defeat Petitioner's motion to dismiss the class claims and for summary judgment (an effort which was successful), Respondents represented:

> "It is important to understand the exact nature of the class relief being sought by Plaintiffs. No money damages are sought for any member of the class not before the Courts nor is specific relief sought for any member of the class not before the Court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future."

within its discretion in denying Respondents' tardy claim for back pay, and the Fourth Circuit panel exceeded the proper scope of appellate review in substituting its own judgment for that of the trier of facts.

3. The decision below is one of a number of recent lower court cases which could be read to authorize class-wide back pay in Title VII actions where some members of the class did not file a charge with the EEOC prior to commencement of the lawsuit. *See, e.g., Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d at 256-258.

The EEOC complaint and conciliation procedures built into Title VII were an integral part of the legislative compromise which led to the passage of the Civil Rights Act of 1964. After Federal Rule 23 was liberalized in 1966, the lower courts rather quickly reached a concensus that class actions seeking injunctive relief are appropriate under Title VII. Such a decision has relatively little impact, since injunctive relief in favor of the individual plaintiff normally will benefit all members of the class whether or not they are parties to the lawsuit. For example, Petitioner had little reason to be concerned on appeal with the District Court's preliminary order overruling Petitioner's objection to the class action, since the District Court ultimately denied back pay relief.

A class action for back pay, however, is quite another matter, both because of its economic impact on the defendant, and because of the administrative burdens it places on a federal court, which must process untold numbers of individual monetary claims without the assistance of the EEOC complaint and conciliation procedures. This Court should grant certiorari to review whether a class action for back pay under modern Rule 23 is inherently inconsistent with the Congressional intent behind the remedial provisions of Title VII.

The Decision Below Regarding Testing Misconstrues Griggs In A Manner Which Effectively Precludes The Use Of Job Validated Employment Testing And Nullifies The Congressional Intent Reflected In 42 U.S.C. § 2000e-2(h).

In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), this Court held that the use of a testing or measuring device as a controlling force in employment or promotion violates Title VII if the device disqualifies blacks at a substantially higher rate, unless it is established that the test is "demonstrably a reasonable measure of job performance." This Court recognized that the use of suitably job-related tests was expressly sanctioned by Congress in Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).

In *Griggs,* the employer had made no effort to "validate" its testing and educational requirements in accordance with professionally accepted methods of measuring the correlation between test results and job performance. On the other hand, Petitioner, following this Court's decision in *Griggs,* and in order to demonstrate that its tests did accurately measure job performance, retained a nationally recognized expert in the field of industrial psychology, who conducted a validation study[11] of Petitioner's tests.

Approving the validation procedures adopted by Petitioner's expert, and noting that the study results showed "positive correlations of a statistically significant nature," the District Court found "that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill." (A. 18) The District Court also concluded that "[t]he defendants have carried the burden of proof in proving that these tests 'are necessary for the safe and efficient operation of the business' and are, therefore, permitted by the Act." (A. 24)

[11] The procedures employed in the validation study were summarized in the District Court's opinion, A. 17, 18.

The three judge panel of the Fourth Circuit, with one strong dissent, held that the District Court "erred in upholding the validity of the pre-employment tests and in refusing to enjoin their use," relying on the failure to include in Petitioner's validation study "some form of job analysis resulting in specific and objective criteria for supervisory ratings," as supposedly required by the EEOC testing guidelines, 29 C.F.R. § 1607. The Circuit Court's decision thus raises a fundamental question as to the proper application of Section 703(h) and this Court's decision in *Griggs*.

While this Court in *Griggs* endorsed the EEOC guidelines as "expressing the will of Congress," 401 U.S. at 434, the Fourth Circuit majority's requirement of detailed and rigid compliance with the EEOC criteria for validation studies is inconsistent with this Court's recent decision in *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973). Likewise, the decision below conflicts with decisions in other Circuits which have refused to require compliance with each technical form of validation procedure set out in the guidelines. *United States* v. *Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973);[12] *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972).

Test validation is a professional exercise in statistical prediction. Perfection is inherently unattainable, and the practical realities of a particular employment setting must inevitably dictate the precise validation technique to be used. Thus, it is unrealistic to read the detailed and technical EEOC guidelines as establishing a mechanical structure which all validation efforts must satisfy. The ultimate result of the decision below would surely be to deny employers a realistic opportunity to establish that their tests are "de-

[12] The Fifth Circuit has since suggested, in dictum, that the guidelines had been found to be mandatory in the *Georgia Power* case. *Pettway* v. *American Cast Iron Pipe Co.*, *supra*.

monstrably a reasonable measure of job performance." Such a result would render Section 703(h) a nullity and frustrate the intent of Congress and of this Court's decision in *Griggs*.

The Decision Below Improperly Usurps The Power Of The District Court On Remand.

The decision below includes a directive that the District Court enjoin Petitioner's use of its tests. Given the nature of the Fourth Circuit's ruling, this is an intrusion on the proper function of the District Court. The Fourth Circuit did not hold that Petitioner's tests were not job related or that the tests could not be validated. It held only that the prior attempt at validation was procedurally inadequate. Even if that ruling was correct, it does not follow that Petitioner cannot ultimately rebut the *prima facie* case of discrimination by properly validating the tests. Compare *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

Under these circumstances, the Court of Appeals should have remanded to the District Court as was done in *United States* v. *Georgia Power Co., supra.* The court therein noted:

> "[S]tandards for testing validity comprise a new and complicated area of the law. While the Hite Study did not demonstrate compliance with the Act, we hesitate to penalize this litigant, the first to confront such a demanding burden of proof, for failing to introduce a more rigorous study. Had our standards been articulated at the time of trial, it may be that the company could have proven its compliance. Therefore, rather than now proscribing the testing program which Georgia Power has used, we remand this phase of the case to the trial court with directions to permit the company a reasonably prompt opportunity to validate

> the testing program applied to the plaintiffs, in accordance with the principles enunciated in this opinion." 474 F.2d at 917-18.

The question on remand should be whether the equities favor an immediate injunction against Petitioner's use of tests, which carries all the ramifications of a finding of discrimination, or favor further proceedings designed to determine whether the possible deficiencies in the validation study could be corrected. This is a question of potentially great importance which the Court of Appeals should have left in the first instance to the discretion of the District Court. *Cf. Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967); *Byrd* v. *Blue Ridge Rural Elec. Corp.*, 356 U.S. 525 (1958).

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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October 7, 1974

CERTIFICATE OF SERVICE

I, Francis V. Lowden, Jr., counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served all parties required to be served by depositing three copies of the foregoing Petition for Writ of Certiorari in the United States Mail, first class postage prepaid, this 7th day of October, 1974, addressed to: Jack Greenberg, Esq., 10 Columbus Circle, New York, New York 10019; J. Levonne Chambers, Esq., East Independence Plaza, 951 S. Independence Blvd., Charlotte, North Carolina; Thomas T. Clayton, Esq., 307 W. Franklin St., P. O. Box 236, Warrenton, North Carolina; Conrad O. Pearson, Esq., 203½ E. Chapel Hill Street, P. O. Box 1428, Durham, North Carolina; Warren Woods, Esq., Wilson, Woods & Villalon, Suite 1032, Pennsylvania Building, Pennsylvania Avenue & 13th Street, Washington, D. C. 20004; William K. Slate, II, Clerk, United States Court of Appeals for the Fourth Circuit, Richmond, Virginia 23219.

FRANCIS V. LOWDEN, JR.
Counsel for Petitioner

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

APPENDIX A

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

DUPREE, District Judge:—Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., on their own behalf and on behalf of other Negroes similarly situated, alleging violations by their employer and their local union of their rights to equal employment opportunities. Jurisdiction is vested in this court by the Act and by 28 U.S.C. § 1343.

The named plaintiffs are citizens of the United States and of the State of North Carolina, residing in Halifax County, North Carolina. On July 15, 1971, this court entered an order allowing the action to be prosecuted as a class action under Rule 23 of the Federal Rules of Civil Procedure, and the class was defined as (1) all Negroes employed at the Roanoke Rapids plant of Albemarle Paper Company as of June 30, 1967; (2) all Negroes employed at said plant after June 30, 1967, except those whose initial permanent positions were not job classifications limited to or predominantly staffed by Negroes; and (3) all Negroes who may hereafter apply for or be employed at said Roanoke Rapids plant who may be affected by the alleged racially-discriminatory employment practices of the defendants.

The alleged discriminatory employment practices have occurred at a pulp and paper plant in Roanoke Rapids, North Carolina. The multitude of defendants is explained by changes in the corporate ownership of the plant which have occurred since the institution of this action more than five years ago. However, the operation at Roanoke Rapids has at all pertinent times been called the Albemarle Paper Company and, therefore, for purposes of discussion, unless

clarity otherwise dictates, such operation will be referred to as "Albemarle."

The action encompasses all aspects of the hiring and promotion practices within the Roanoke Rapids facility and the application of the provisions of the collective bargaining agreements entered into by it with the defendant Union. The essential issues relate to the educational and testing requirements for employment and promotion utilized at the plant and the effects of the "job seniority" system embodied in the respective union contracts.

This cause was tried by this court without a jury, and having considered the evidence, briefs, oral arguments and the voluminous five-year accumulation of pleadings and other court papers, the court makes the following

Findings of Fact

1. On May 9, 1966 the named plaintiffs filed charges against Albemarle, Halifax Local No. 425 and United Papermakers and Paperworkers, AFL-CIO (United Papermakers) before the Equal Employment Opportunity Commission (EEOC) pursuant to the provisions of Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a). These charges raised the issues set forth in the complaint filed with this court.

2. Plaintiffs received letters dated July 28, 1966 from EEOC notifying them that they were entitled to file suit in federal district court under Title VII of the Act. The complaint in this action was timely filed on August 25, 1966.

3. The paper mill was built in 1907 and it began business under the name of Halifax Paper Company. In 1937 a Virginia corporation, Albemarle Paper Company, acquired the

plant. Albemarle Paper Company (Virginia), a wholly owned subsidiary of the defendant Ethyl Corporation, operated the plant at the time this action was filed. On October 31, 1968, the paper mill was transferred to defendant Albemarle Paper Company, a Delaware corporation. Albemarle Paper Company (Delaware) is a wholly owned subsidiary of defendant Hoerner Waldorf Corporation, a Delaware corporation. Albemarle's (Virginia) name was changed to First Alpaco Corporation and thereafter was merged into defendant Ethyl Corporation.

4. There has been a continuation of the business in substantially the same manner in which the business was operated prior to the transfer on October 31, 1968; the plant location is the same; the work force is substantially the same; the jobs and working conditions are substantially the same; the method of production is substantially the same; the products and services provided are substantially the same; and the machinery and equipment are substantially the same.

5. Albemarle is a leading employer in the Roanoke Rapids area. It pays higher wages than most, if not all, industries in the area.

6. At all pertinent times the Albemarle facility at Roanoke Rapids has been an employer in an industry affecting interstate commerce and has more than 100 employees.

7. Defendant Local No. 425 (hereafter referred to as the "Union") is a labor organization which is and has been a party to collective bargaining agreements with Albemarle pertaining to production and maintenance employees at the Roanoke Rapids plant and negotiates on their behalf concerning the wages, terms and conditions of employment with respect to those employees. The Union is a labor organiza-

tion within the meaning of Section 701(d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(d) and (e).

8. The operations of Albemarle, as is characteristic of pulp and paper mills throughout the United States and Canada, are organized on a departmental basis in accordance with the type of work performed in each department. The jobs within each department generally require skills and ability which differ from one department to another and each department has a specific function of its own in the overall operations of the mill. For purposes of employee classification and promotion, each of the departments is organized into one or more "lines of progression." In all but exceptional circumstances, entrance of new employees into each department is effected at the lowest-paying, least responsible job of the lines of departmental progression and vacancies are filled by promotions within the lines.

9. There are over 100 different jobs at the Roanoke Rapids plant ranging from Janitorial to Complex Machine Operator. Of these, approximately 86 are jobs traditionally reserved for white persons ranging from jobs of Helper and Laborer to Machine Operator.

10. Promotion and demotion within a line of progression is governed by seniority and ability. The 1965 and 1968 labor agreements provide in part that "when all factors that constitute ability are relatively equal, then seniority in keeping with established lines of progression within a given department shall prevail."

11. Thus, the seniority system utilizes "job seniority" for promotions and demotions. This means that the employee who has the greater seniority in the job within the line of progression immediately below the vacancy to be

filled would normally be given the first opportunity to fill the vacancy even though other employees in the same job classification have more plant and departmental seniority, assuming that the person has the necessary ability, experience and training to do the higher job.

12. When a layoff occurs within a line of progression or department, the employees bump downward and the most junior employees are either laid off or offered Call Board work. Employees who are returned to the Call Board or are laid off retain their seniority rights in their former department and line of progression, but do not have a seniority preference to an opening in a different department or line of progression.

13. A 1965 labor agreement provided that employees could request transfers from one department (or line of progression) to another department (or line of progression). This provision was contained in the labor agreements prior to 1965. Whether or not the transfer was granted was within the sole discretion of the company. If an employee transferred at his own request, his seniority in his former department or line of progression ceased immediately unless within thirty days the employee returned to his former department or line of progression because of his health or physical condition. When the transfer was affected at the request of the company, his seniority in the department (or line of progression) left would be retained for a period of six months from the date of transfer. An employee transferred would, therefore, enter at the bottom job in the line of progression and would suffer a reduction in pay if that job to which he was permitted to transfer carried a rate of pay less than the job from which he had transferred.

14. This provision was amended by the 1968 labor agreement to read:

"10.2.1 Employees who wish to transfer from one department (or line of progression) to another may file through their foreman with the Personnel Department of the Company written application stating the department (or line of progression) and the job therein to which he wishes to be transferred. The decision of the Company in granting or denying such request for transfer is to be final. However, when an employee transfers from one department (or line of progression) to another upon his own request, his seniority in the department (and line of progression) left shall cease immediately unless within thirty (30) days from the date of such transfer the health or physical condition of such employee makes it advisable to transfer him back to the department (or line of progression) left. Where the transfer is effected at the request of the Company, his seniority in the department (or line of progression) left shall be retained for a period of six months from date of transfer.

"10.2.2 When the Company grants a transfer as described in 10.2.1, then the transferred employee will be vested with department and job seniority equal to that held in his last job or equal to that held in the lowest job in the line of progression from which transferred.

"10.2.3 When the Company grants such a transfer as described in 10.2.1, then the transferred employee will be paid his present rate if higher than the rate of the job to which transferred until such time as the employee progresses to a job in the new line of pro-

gression which pays as much or more than his rate in his last classification in his former line of progression. An employee who is permitted to carry a higher rate to another department or line of progression shall have such rate reduced to the rate of the job to which he is transferred if the employee is deemed at the time a 'permanent' vacancy occurs in the next higher job in the new line of progression to be unqualified for such job, or with the Company's approval declines a promotion to such a job. Such an employee shall not lose his 'red circle' rate if deemed unqualified and the sole reason for his lack of qualification is a determination by the Company that he has not had sufficient time in the new line of progression to obtain the training and experience necessary for promotion. In applying Section 10.2.1, if the Company decides to fill a vacancy by transferring an employee who has made application pursuant to the foregoing provisions and there are on file more than one such application for the job opening, then the Company will offer the transfer to the senior qualified employee making application."

The rate retention provision referred to in Section 10.2.3 is commonly known as "red circling."

15. Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression. The racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965). As of June 30, 1967, the racial composition of jobs, departments and lines of progression were as follows:

A. *Wood Yard Department*

	Negro	*White*
Yard Crew		
Crane Operator (Large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4
Chip Unloader	1	3
Chain Operator	0	4
Chipper Operator No. 2		
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborers	12	0
Knife Grinder*	0	1
Service Crew		
Dempster-Dumper	1	0
Winch Truck Operator	3	0
Winch Truck Operator Helper	1	0
Laborer	6	0

B. *Pulp Mill Department*

Digester Operator	0	4
Stock Room Operator	0	4
Stock Room First Helper	0	4
Kamyr Operator	0	4
Stock Room Second Helper	0	4
Lead Loader-Blower	0	4
Loader	0	10

* The Knife Grinder is in the Wood Yard Department but is not in a line of progression. This position is occupied by a white person.

	Negro	*White*
CE Recovery Operator	0	4
First Helper No. 6	0	4
Second Helper	0	4
Caustic Operator	0	4
Lime Kiln Operator	0	4
General Utility Operator	0	1
By Products Operator	0	2
Payloader	1	0
Lancer	4	0
Salt Cake Man	1	0
Janitor-Dead End Job	1	0
C. *A Paper Mill Department*		
Paper Machine Line Of Progression		
Machine Tender No. 1	0	4
Machine Tender No. 2	0	4
Back Tendeer No. 1	0	4
Third Hand No. 1	0	4
Third Hand No. 2	0	4
Fourth Hand No. 1	0	4
Fourth Hand No. 2	0	4
Front Plugger No. 1	0	4
Back Plugger No. 1	1	4
Back Plugger No. 2	0	4
Beaterman	0	4
First Helper	0	4
Brokeman	4	0
Stock Puller	0	0
Laborer	1	0
D. *B Paper Mill Department*		
Machine Tender	0	8
Back Tender	0	8

	Negro	*White*
Third Hand	0	8
Fourth Hand	0	8
Fifth Hand	0	8
Sixth Hand	0	8
Seventh Hand	0	4
Spare Hand	1	5
Janitor-Dead End Job	5	0
Stock Room Operator	0	4
Stock Room First Helper	0	4
Stock Room Second Helper	0	4
E. *Product Department B Papermill*		
Sheeter Operator	0	2
Rewinder Operator (large)	0	4
Rewinder Operator Helper (large)	0	4
Rewinder Operator (small)	0	4
Sheeter Operator Helper	0	4
Wrapper, Tier, Capper	1	16
Rewinder Plugger	1	2
Core Cutter	0	2
Janitors	3	0
Scale Clerk	0	5
Lift Truck Operator	0	13
Utility Man	0	8
Laborers	0	6
F. *A Mill Finishing Department*		
Lead Loader	1	0
Lift Truck Operator	1	0
Lead Tier & Wrapper	1	0
Wrapper, Loader & Brokeman	2	0
G. *Boiler Department*		
Boiler Operator	0	4

	Negro	*White*
H. *Power Plant Department*		
Power Plant Operator	0	4
First Helper	0	4
Second Helper	0	4
Utility Man	0	4
I. *Technical Service Department*		
B Mill Shift Testman	0	4
A Mill Shift Testman	0	4
General Lab Testman	0	2
Lab Trainee	1	10
Lab Assistant	0	2
Lab Leadman	0	1
J. *Storeroom Department*		
Storeroom Clerk A	0	2
Storeroom Clerk C	0	1
Storeroom Clerk D	0	0
K. *Maintenance Department Employees*		
1st Maintenance Emp. Appren.	0	1
2nd Maintenance Emp. Appren.	0	9
3rd Maintenance Emp. Appren.	0	4
4th Maintenance Emp. Appren.	0	2
5th Maintenance Emp. Appren.	0	7
6th Maintenance Emp. Appren.	1	0
7th Maintenance Emp. Appren.	0	1
8th Maintenance Emp. Appren.	0	1
"C" Maintenance Employee	0	3
"B" Maintenance Employee	0	3
"A" Maintenance Employee	0	99
Leadman Maintenance Employee	0	7
L. *Miscellaneous*		
General Extra Board	2	62

	Negro	*White*
Utility Extra Board	50	0
Truck Drivers	0	4

The "Extra Boards" of Item "L" above were introduced in the early 1950's for the purpose of maintaining a reservoir of employees who would be available to staff entry level jobs in the various lines of progression. The General Extra Board fed the "skilled" lines of progression and the Utility Extra Board fd the "unskilled" lines of progression. Both were manned by new employees and employees who had been laid off of other jobs and were waiting recall.

16. The 1968 labor contract made certain changes in the lines of progression. The chipper operator and crew lines of progression were merged on the basis of rates of pay into one line of progression, as were the chipper operator and line crew lines of progression and the brokeman and beaterman lines of progression. Separate departments were created out of old departments and the "dead end" job of janitor was eliminated. These changes in the lines of progression had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still "locked" in the lower paying job classifications. For example, the line of progression and the black-white racial composition of the reorganized wood yard department were as follows:

Wood Yard Department

	Negro	*White*
Crane Operator (American)		
Crane Operator (large)	0	9
Long Log Operator	0	4
Log Stacker Operator	0	4
Small Equipment Operator	0	4
Bulldozer Operator	0	1
Oiler	0	4

	Negro	*White*
Chip Unloader	1	3
Chipper Operator No. 2		
Chain Operator	0	4
Chipper Operator No. 1	4	0
Tractor Operator	5	0
Chip Bin Operator	4	0
Laborer	12	0

Thus, the blacks occupied the bottom twenty-five job positions within the wood yard department.

17. The General Extra Board and the Utility Extra Board were merged in 1968. Employees on the merged board still retain recall rights to jobs and lines of progression which they held prior to being reduced to the call board. The effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs.

18. Prior to 1958 no employment personnel tests were given to applicants at the Roanoke Rapids plant. In about 1956 the personnel manager was requested to design a personnel screening program for use in the selection of new employees to be hired for jobs created by the installation of a new paper machine. In this connection two "paper and pencil" tests—the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension Test—were selected. New employees hired for the General Extra Board and the Maintenance Department were required to score successfully on the Beta as well as have a high school education.

19. In an effort to validate the Beta, the examination was administered to a sample of employees who worked on the No. 3 paper machine, maintenance employees and possibly some employees in the pulp mill. The method that was

followed is known by industrial psychologists as concurrent validation, that is, employees that were tested were then rated by their supervisors on the basis of performance on the job. As a result of this study, a cutoff score of 100 was established for the Beta. No blacks were known to be included in the validation sample.

20. Use of the Bennett Mechanical Test, which had previously been administered to job applicants, was discontinued in about 1963 and the company initiated use of the Wonderlic, A and B series, along with the Beta test. Since that time the two pre-employment tests, the Beta and the Wonderlic, series A and B, have been administered to applicants for Crane Operator (Wood Yard), Digester and C. E. Recovery (Pulp Mill), Paper Machine and Beater (A Paper Mill), Paper Machine and Stock Room (B Paper Mill), Power Plant Operator (Power Plant), Boiler Operator (Boiler Room), Mill and Laboratory (Technical Services) and Finishing and Shipping Crew (B. Mill Product) lines of progression.

21. The Beta examination is a nonverbal test, developed during World War I to measure the intelligence of illiterate and non-English-speaking individuals.

22. The Wonderlic, series A and B, are short, verbal, widely-used intelligence tests. The explanation given for the use of these tests is that it was felt that it was essential for new employees to have certain verbal facilities because of the increasing technical nature of the mill operation. The cutoff score which was utilized for the Wonderlic, series A and B, is 18 on either test.

23. A high school education requirement was introduced in the early 1950's in response to a difficulty in finding qualified people for a modernized pulp mill. It was intended to

assure a certain level of reading skill needed to comprehend the increasingly difficult material which accompanies technological innovations.

24. In December of 1964, Albemarle offered incumbent Negro employees who were then working in the Chipper, Service Crew, Payloader, Brokeman, First Fireman and Lead Loader lines of progression an opportunity to take the personnel tests in order to be considered for jobs in other lines of progression and waived its high school education requirement for incumbent black employees who could successfully pass these tests. This offer was made a second time on November 4, 1965, and some Negro employees took the test and were transferred. However, a majority of those who took the tests failed them.

25. Employees who do not have a high school education and who are in jobs in lines of progression are not required to successfully pass the test battery in order to be considered for future promotions in that line of progression. The policy applies to similarly situated white and black employees.

26. Albemarle has waived the necessity of successfully passing the test battery for a few of the black employees who do not have a high school education. Similarly, exceptions to this practice have been made for white employees.

27. Apart from the standardized lines of progression, Albemarle maintains a maintenance staff which services and repairs machinery throughout the mill. The maintenance staff is not served by the call boards. In 1959 the company with the agreement of the Union established a formalized training program for maintenance employees called the Maintenance Apprenticeship Program. A high school education and passing test scores are required for en-

trance into the program. Three employees selected by the Union and three members selected by the maintenance superintendent periodically review the performance of apprentices and recommend promotion or demotion within the program to the maintenance superintendent. The maintenance program is not divided into functional craft divisions. Thus, all employees in the program must qualify to acquire the skills of a machinist, welder, carpenter, electrician, painter, oiler, pipefitter, rigger, millwright and insulator during the apprenticeship program.

28. In 1964 prior to the effective date of the Civil Rights Act of 1964, the company began actively recruiting black applicants from the local high schools to apply for the Maintenance Apprenticeship Program. In addition, the company solicited applications from black employees working in other departments in the mill. The first black employee entered the program in 1964. There were five blacks in the program by September of 1967 and as of 1970, ten blacks had entered the program. All had successfully met the high school and test qualifications for entrance.

29. After the Supreme Court decision in Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971), Albemarle again conducted validation studies of its testing and educational requirements. The company employed an expert in the field of industrial psychology and testing to conduct the studies. This expert utilized two manuals which outlined generally-accepted procedures for determining criterion-related validity: "Guidelines of Employee Selection Procedures," Equal Employment Opportunity Commission, August 1, 1970, and "Standards for Educational and Psychological Tests and Manuals," published by the American Psychological Association.

30. In a study done on the testing requirements of Albemarle, the expert applied the "concurrent validation" technique to ten specific skill-related job groupings or lines of progression. An attempt was made to include in the sample all of the employees within the designated job groups. Two black employees refused to participate in the study, leaving only four blacks in the selected sample. Given this sample size, it was technically infeasible to validate the tests on a biracial basis.

31. Each employee in a job grouping was individually rated in comparison to every other individual employee in that grouping to obtain a ranking of job performance. The ratings took into consideration the elements of work behavior and job success. This rating method was performed twice by two different supervisors making independent evaluations. Neither of the raters had access to or knowledge of the sample employees' performance on the aptitude tests. The results of the dual ratings were then averaged to obtain the final job rating of the employees within each specific unit.

32. Each rated employee took, or had already taken, three tests—the Wonderlic Form A and Form B and the Beta Examination. The test scores were recorded for each individual. The tests were administered under controlled conditions by a trained personnel employee who had four years of experience administering these particular tests.

33. The sample group rated and tested consisted only of present employees. The group tested was typical of employees in the skilled lines of progression. They were selected from the top and middle of various lines. Professional studies have shown that when tests are validated in such a narrow range of competence, there is a

greater chance that the test will validate even a broader range, that is, if job candidates as well as present employees are tested.

34. The data obtained from the ratings and the data obtained from the test scores were mailed to Purdue University where statistical correlation was performed. The expert correlated the job performance ratings and the test scores using the "Phi coefficient" formula to determine whether successful performance on the test was related to successful performance on the job.

35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings. More particularly, the study revealed that eight of the ten units correlated positively on at least one of the tests in a manner which could have occurred only by chance only once in a hundred times. One unit correlated positively in a manner that could have occurred only once in twenty times.

36. The conclusion of the validation studies was that "inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests can be reasonably used for both hiring and promotion for most of the jobs in this mill. The charts indicate that a minimum score of 103 on the Beta for jobs in Recovery and Evaporation and a minimum score of 17 on the Wonderlic A for jobs in the other groups shown in the charts would not be at all out of line."

37. In addition to the validation studies that he performed on the aptitude tests, the defendants' expert undertook a specialized study to determine whether the company's high school requirement bore a significant relation

to the jobs for which it was a prerequisite. Since the high school requirement was instituted in the hope of improving the reading levels of new employees, the expert designed a study to focus on this variable.

38. The EEOC Testing Guidelines provide that "appropriate validation strategies" may be substituted for a criterion-related validity study where the latter is not technically feasible. Under these circumstances, strategies to measure "content" relationships are permitted. In the case of the high school requirement, neither of the two principal criterion-related methodologies were feasible. A "concurrent validation" study was not feasible because present employees did not constitute a statistically fair sample of high school graduates and non-high school graduates. Similarly, a "predictive validation" study was not feasible because that method, by its nature, would require the indiscriminate hiring of high school and non-high school control groups, measuring their performance over an extended period of time, then correlating the data. The company's expert designed a strategy to measure the verbal skills and aptitude needed to comprehend reading material and other "content" which is integral to successful performance on jobs in the skilled lines of progression. For the first phase of this test a professionally-developed formula, the "Flesch Readability Index," was used to measure the reading difficulty of standard Operating Manuals used in the skilled lines of progression at the Roanoke Rapids mill. These manuals contain information relating to the operation of sophisticated machinery. The sample manuals used in the study were chosen by normal "random selection" from a file containing all of the reading material used in the skilled lines. The second phase of the technique employed merely required the expression of the "Flesch Count" in terms of

the relevant criterion to be validated—in this case grades of education.

39. The "Flesch Index," which measures the difficulty of "content" based on syllable/word and word/sentence ratios, revealed that the reading difficulty of the Operating Manuals was such as to require the reading level of a high school graduate with perhaps some college. The expert concluded from his study that an individual must read at least at the level of a normal high school graduate to read the manuals.

40. The Operating Manuals contain information, the knowledge of which is required for the safe and efficient use of the machines and chemicals in the plant.

41. Some industrial psychologists believe that the average scores obtained by blacks as a group on written tests are lower than the average scores obtained by whites as a group. Although the reasons for this are not entirely clear, it is explained in part by the fact that blacks in many parts of the country obtain inferior schooling as compared to whites and, in part by the fact that in some cultural backgrounds where blacks are not accustomed to close working relationships with whites, test scores of blacks are affected by having the test administered by white examiners. This is true not only for blacks but also for Mexicans, Puerto Ricans and whites of a lower income group. Although psychologists have made and are making an effort to construct cultural-free tests, these efforts, in the opinion of some psychologists, have not been successful so far.

42. A personal tour of the defendants' plant in company with counsel for plaintiffs and defendants served to convince the court that much of the machinery now in use is of a highly sophisticated and technically complex nature.

Computers are used extensively throughout the production process as well as in the record-keeping, billing, shipping, purchasing and accounting operations. The efficient maintenance and operation of this machinery and electronic equipment obviously requires employees with a high level of native intelligence, prolonged training and experience.

Conclusions of Law

1. This court has jurisdiction of this action under the provisions of Section 706(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f).

2. The corporate defendants are employers in an industry affecting interstate commerce within the meaning of Section 701(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

3. The defendant Local 425 is an organization engaged in an industry affecting commerce within the meaning of Section 701(d), (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(d), (e).

4. Plaintiffs have complied with the procedural requirements of Section 706(a), (d) and (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (d) and (e).

5. Section 703(a) of Title 7, 42 U.S.C. § 2000e-2(a), prohibits an employer from discriminating against an employee "with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race . . . ," or from limiting, segregating or classifying an employee "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race." Subsection (c) of the same sec-

tion defines as unlawful employment practices similar acts when done by a labor union. Subsection (h) provides that

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment *pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race* . . . nor shall it be an unlawful employment practice for an employer to give and to act upon the results of *any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race* . . . ." (Emphasis added.)

6. The Act does not provide redress for discriminatory employment practices occurring prior to July 2, 1965, the effective date of the Act. However, employment practices which tend to perpetuate past discriminations are unlawful unless there is an overriding legitimate, non-racial business necessity, Griggs v. Duke Power Company, 401 U.S. 424, 3 FEP Cases 175 (1971); Robinson v. Lorillard, 444 F.2d 791, 3 FEP Cases 653 (4th Cir. 1971). And Section 706(g) of the Act, 42 U.S.C. § 2000e-5(g), provides for equitable relief only if the court finds that a defendant "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This provision has been interpreted to require only that the defendant "meant to do what he did, that is, his employment practice was not accidental." See Robinson, supra, at 796 (quoting from Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d at 996, 1 FEP Cases 875, 71 LRRM 3070). Viewed in this light, it is clear that Albemarle

practiced racially discriminatory employment practice prior to July 2, 1965; that the effects of this discrimination has been perpetuated; and that such employment practices are unlawful under Title VII of the Civil Rights Act of 1964.

7. It is undisputed that prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Negro employees were traditionally assigned to the lower paying lines of progression. Although overt racial discrimination ceased subsequent to the effective date of Title VII, the effects of this racial discrimination have not been eradicated. The job seniority system has resulted in blacks occupying the lower paying positions within an integrated line of progression. Other lines of progression remain essentially segregated because of the inability of black employees to meet the educational and testing requirements to transfer into other, higher-paying lines of progression. It follows that these practices must be enjoined in toto unless they have been shown to be "necessary to the safe and efficient operation of the business." Jones v. Lee Way Motor Freight, 431 F.2d 245, 249, 2 FEP Cases 895 (10th Cir. 1970), cited with approval in Robinson, supra.

8. This court has found as a fact that the efficient maintenance and operation of Albemarle's machinery requires a certain degree of training and experience. However, a system of promotion and demotion based upon *job seniority,* unrelated to the minimum tenure required to gain the necessary proficiency in that job classification, is arbitrary and, when viewed in the context of past discriminatory practices, constitutes an unlawful employment practice. A system of promotion and demotion based on *plant* seniority would accomplish the purpose of awarding faithful employees, and a job residency requirement, based upon the minimum tenure required to gain the skill and proficiency

of a given job classification, would insure the safe and efficient operation of the plant and the promotion of black employees relatively unhindered by past overt acts of employer discrimination. See Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980, 1 FEP Cases 875, 71 LRRM 3070 (5th Cir. 1969); Long v. Georgia Kraft Company, 2 FEP Cases 658 (N.D.Ga. 1970).

9. This court has also found as a fact that a certain level of native intelligence is required for the safe and efficient operation of Albemarle's often complicated and sophisticated machinery. The personnel tests administered at the plant have undergone validation studies and have been proven to be job related. The defendants have carried the burden of proof in proving that these tests are "necessary for the safe and efficient operation of the business" and are, therefore, permitted by the Act. However, the high school education requirement used in conjunction with the testing requirements is unlawful in that the personnel tests alone are adequate to measure the mental ability and reading skills required for the job classifications.

10. In addition to injunctive relief, the plaintiffs seek an award of the amount of pay which would have accrued to them had there been no unlawful practices. 42 U.S.C. § 706(g) provides that the court "*may* . . . order such affirmative relief as *may* be appropriate, including reinstatement or hiring of employees, *with or without back pay.*" The statute thus speaks clearly in terms of the discretionary power of the court. See Local 186, International Pulp, Sulphite and Paper Mill Workers v. Minnesota Mining and Manufacturing Company, 304 F.Supp. 1284, 1 FEP Cases 764, 71 LRRM 2427 (N.D.Ind. 1969). Robinson, supra, can be read to hold that back pay is a compensa-

tion for a tangible economic loss and that the plaintiff is *entitled* to that compensation. However, the Fourth Circuit was there concerned with the defendant's contention that it was an abuse of discretion to *award* back pay. It did not address itself to the clear statutory language of Section 706(g).

In the instant case there was no evidence of bad faith non-compliance with the Act. It appears that the company as early as 1964 began active recruitment of blacks for its Maintenance Apprentice Program. Certain lines of progression were merged on its own initiative, and as judicial decisions expanded the then existing interpretations of the Act, the defendants took steps to correct the abuses without delay. And perhaps unlike the tobacco industry involved in Robinson, supra, the paper industry is justified in requiring that its employees possess a certain degree of training and experience. Furthermore, there is evidence to support a finding that Albemarle has consistently paid higher wages at all levels of employment than those paid by other industries in the area—doubtless a reflection of the sophistication of the industry.

In addition, an award of back pay is an equitable remedy. Robinson, 444 F.2d at 802, supra. The plaintiffs' claim for back pay was filed nearly five years after the institution of this action. It was not prayed for in the pleadings. Although neither party can be charged with deliberate dilatory tactics in bringing this cause to trial, it is apparent that the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants might have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue. See Rental Development Corporation of America v. Lavery, 304 F.2d 839, 842 (9th Cir. 1962), cited with approval in Robinson, supra.

On the basis of the foregoing Findings of Fact and Conclusions of Law it is now

Ordered, Adjudged And Decreed

I. Albemarle Paper Company (Delaware) and Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, their officers, agents, employees and servants and all persons in active concert or participation with them, are hereby permanently enjoined and restrained from discriminating against the Negro employees of the defendant Albemarle Paper Company (Delaware) at its paper mill in Roanoke Rapids, North Carolina, in violation of Title VII of the Civil Rights Act of 1964.

A. In particular, the defendants are ordered to abolish the existing seniority system based substantially on job seniority and to refrain from negotiating or implementing any other seniority system designed to discriminate or having the effect of discriminating against Negro employees, insofar as such systems may apply to permanent job assignments, and permanent promotions and lay-offs of employees in the affected class, in competition with other employees at the Roanoke Rapids paper mill of Albemarle Paper Company (Delaware).

B. In place of the seniority system so abolished, the defendants are ordered to implement and permanently continue a system of plant seniority with respect to permanent job assignments and permanent promotions and layoffs of employees in the affected class, so that in making permanent promotions or demotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, when employees of the affected class are competing with employees not of the affected class, and the qualifications of the competitors are

relatively equal, plant seniority rather than job seniority shall govern. Albemarle Paper Company (Delaware) shall not discriminate on the basis of race in making any temporary assignments, promotions, layoffs or demotions at its Roanoke Rapids plant.

C. Plant or mill seniority shall be determined as length of continuous service from most recent date of permanent employment.

D. Qualifications as used immediately above and elsewhere in this decree shall be deemed to refer to (1) ability and fitness, (2) knowledge and training, and (3) experience and skill developed during an employee's tenure at the mill. Where a member of the affected class with higher plant seniority competes for a job with a non-member having lower plant seniority, the latter shall not be deemed more qualified for promotion simply because of ability, fitness, knowledge, training, experience or skill which are the product of his longer tenure in job slots immediately below the vacancy, subject, however, to the use of reasonable residency requirements in job slots within lines of progression as set forth in Appendix A to this decree. The residency requirements of Appendix A are subject to amendment if the parties, within thirty days, submit additional evidence or stipulations bearing on the minimum on-the-job training requirements for safety and proficiency in a given job classification.

E. In making permanent promotions within a line of progression, or in making permanent transfers, promotions or demotions to or from a line of progression, the lowest paying job in each line of progression shall be the proper job for beginning in the line, and proper progression shall be to the job next higher than that currently held by the employee.

F. Normal seniority provisions, without the modifications of this decree, shall prevail in making permanent promotions or demotions:

1. When employees not of the affected class compete with each other, such as when no employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees not of the affected class who have longer company service than an affected class employee in the job classification from which the promotion or demotion is to be made;

2. When employees of the affected class compete with each other, such as when all employees in the job classification from which the promotion or demotion is to be made are of the affected class, or when there are two or more employees of the affected class who have longer company service than an employee who is not of the affected class in the job classification from which the promotion or demotion is to be made.

G. Employees who are transferred from one line of progression to another shall carry their seniority and wage rate as provided in Section 10.2.2 and 10.2.3 of the current Labor Agreement, except that in no event shall the rate retention right or "Red Circle" rate exceed $3.36 per hour (straight time). The "Red Circle" protection provided in this paragraph shall apply to only one transfer made pursuant to this decree.

H. Defendants are directed to amend the seniority provisions of Section 10 of the Labor Agreement to provide for the posting of all permanent vacancies to entry level jobs in the various lines of progression as contained in Ap-

pendix A. Such posting shall be for three (3) calendar days on the clock house bulletin board.

I. The defendants are permanently enjoined and restrained from requiring a high school education as a prerequisite for employment, promotion or transfer.

II. The defendants are directed to amend the Labor Agreement to include provisions for assignments from the Call Board incorporating the following terms:

A. Immediately after a determination has been made of available job assignments, and prior to any assignments being made, employees meeting the shift who have recall rights to any job listed must indicate to the clock room attendant whether or not they wish to exercise such recall rights.

B. Thereafter the senior qualified employee meeting the shift in terms of plant or mill seniority will be given the choice of all the then available jobs. Succeeding offers will been made to those meeting the shift in order of their decreasing mill seniority.

C. Requests coming in after posting of the lists and the start of assignments shall be immediately made available to those meeting the shift who have not already received assignments.

III. The request for abolition of or changes in testing procedures is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

IV. The request for an award of back pay is denied for the reasons set forth in the Findings of Fact and Conclusions of Law.

V. Counsel for the parties are directed to confer among

themselves in an effort to reach an agreement on reasonable attorneys' fees for plaintiffs' counsel and the apportionment thereof among the defendants. They shall report to the court within thirty days of the entry of this decree whether they have been able to reach an agreement, and if not the court will then determine the amount of fees and their apportionment.

It Is So Ordered.

APPENDIX A

Method For Calculating Residency Requirements

When calculating time spent on a particular job for purposes of determining when the residency requirement has been satisfied, the following will be counted toward satisfaction of the residency requirement of a particular job classification:

1. Time worked while permanently assigned to the job in question.

2. Time worked while permanently assigned to a job below the job in question but assigned on a temporary basis to the job in question, provided such temporary time on the job equals or exceeds 48 hours in any calendar month, in which case all such temporary time in that month will be counted. In the event that temporary time on a particular job does not amount to 48 hours in one calendar month, all such temporary time in that month will be counted toward satisfying the residency requirement of the job to which the employee is then permanently assigned.

Time worked on either a permanent or temporary basis as defined above shall satisfy residency requirements as follows:

1. 172 hours actually worked shall satisfy one month of residency.

2. 40 hours actually worked shall satisfy one week of residency.

Residency Requirements

Wood Yard Department	
Crane Operator (American)	
Crane Operator (Large)	11 mos.
Long Log Operator	9 mos.
Log Stacker Operator	8 mos.
Small Equipment Operator	8 mos.
Bulldozer Operator	6 mos.
Oiler	6 mos.
Chip Unloader	3 mos.
Chipper Operator No. 2	3 mos.
Chain Operator	3 mos.
Chipper Operator No. 1	3 mos.
Tractor Operator	3 mos.
Chip Bin Operator	3 mos.
Laborer	1 mo.
Pulp Mill Department	
Digester Operator (Cooker)	
Stock Room Operator	12 mos.
Stock Room First Helper	12 mos.
Stock Room Second Helper	6 mos.
C. E. Recovery Operator	
1st Helper No. 6	15 mos.
Evaporator Operator (when used)	12 mos.
1st Helper No. 5	12 mos.
2nd Helper	9 mos.
Utility Helper	4 mos.
Caustic Operator	
Lime Kiln Operator	12 mos.
By Products Operator	

Leadloader—Blower	9 mos.
Loader	6 mos.
Power Plant	
Power Plant Operator	
1st Helper	18 mos.
2nd Helper	12 mos.
B Mill Shipping	
Scale Clerk	
Lift Truck Operator	12 mos.
Utility Man	9 mos.
Laborer	3 mos.
Boiler Room Department	
Boiler Operator	
Bark Burner Operator	10 mos.
1st Fireman	9 mos.
2nd Fireman	6 mos.
Laborer	3 mos.
B Paper Mill Department	
Paper Machine Progression	
Machine Tender	
Back Tender	36 mos.
3rd Hand	24 mos.
4th Hand	12 mos.
5th Hand	4 mos.
6th Hand	2 mos.
7th Hand	1 mo.
Stock Room Progression	
Stock Room Operator	
Stock Room 1st Helper	12 mos.
Stock Room 2nd Helper	6 mos.

Technical Service	
Mill Progression	
B Mill Shift Testman	
Additive Man	15 mos.
Laboratory	
General Lab Testman	
General Lab Assistant	15 mos.
Sampleman	6 mos.
Trainee	3 mos.
Service Department	
Payloader	
Dempster-Dumpster Operator	10 mos.
Winch Truck Operator	9 mos.
Truck Operator	9 mos.
Winch Truck Operator Helper	3 mos.
Laborer	1 mo.
Store Room Department	
Storeroom Clerk A	
Storeroom Clerk B	6 mos.
Storeroom Clerk C	6 mos.
Storeroom Clerk D	6 mos.
A Paper Mill Department	
Paper Machine	
Machine Tender No. 1	
Machine Tender No. 2	30 mos.
Back Tender No. 1	26 mos.
Back Tender No. 2	26 mos.
Third Hand No. 1	24 mos.
Third Hand No. 2	24 mos.

Fourth Hand No. 1	12 mos.
Fourth Hand No. 2	12 mos.
Front Plugger No. 1	4 mos.
Back Plugger No. 1	4 mos.
Back Plugger No. 2	3 mos.
A Paper Mill Department	
Beater Room	
Beaterman	
1st Helper	12 mos.
Brokeman	6 mos.
Shipping Room Department A Mill	
Lead Loader	
Lift Truck Operator	12 mos.
Lead Tier and Wrapper	6 mos.
Wrapper, Loader, Laborer	3 mos.

* * *

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Before Boreman and Bryan, Senior Circuit Judges, and Craven, Circuit Judge.

Craven, Circuit Judge:

This is a class action arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Plaintiffs are representative members of the class composed of all Negroes employed at defendant's Roanoke Rapids plant and all Negroes who may hereafter apply for employment at the Roanoke Rapids plant. The multitude of defendants is occasioned by changes in corporate ownership which occurred subsequent to the institution of the action. Since the Roanoke Rapids operation has at all pertinent times been called the Albemarle Paper Company, the corporate defendants will hereinafter be referred to as Albemarle.

The district court found that Albemarle practiced racially discriminatory employment practices prior to July 2, 1965, and that the effect of that discrimination had been perpetuated through a job seniority system. Thus, the district court enjoined Albemarle and the defendant union, Halifax Local 425, United Papermakers and Paperworkers, AFL-CIO, from discriminating against Negro employees, and ordered that the job seniority system be abolished and a plant-wide seniority system be implemented. There has been no appeal from these provisions of the court's decree.

The district court refused to order the abolition of or changes in the pre-employment testing procedures used by Albemarle. Plaintiffs appeal from the district court's determination. Judge Boreman concurs with Judge Craven in reversing and remanding to the district court on this issue. Judge Bryan dissents.

The district court also refused to award the plaintiffs back pay. Judge Bryan concurs with Judge Craven in reversing the district court on this issue. Judge Boreman dissents.

The effect of this division in the court is to reverse and remand the district court's determination as to the testing procedures and the refusal to award back pay.

I

Testing Procedures

Prior to 1958, no employment personnel tests were given to applicants for employment at Albemarle. In 1956, the personnel manager was requested to design a screening program for selection of employees for certain departments. In this connection, the Revised Beta Examination (Beta) and the Bennett Mechanical Comprehension were selected to test applicants. A brief study was made at that time to determine the usefulness of the Beta test.

About 1963, the then personnel manager discontinued using the Bennett Mechanical Test since it had not been studied. Use of the Wonderlic Test, A and B series, was initiated at that time. Whereas the Beta is a non-verbal test developed to measure the intelligence of illiterate and non-English speaking individuals, the Wonderlic Tests are *verbal* tests of general mental ability. Use of the Wonderlic Tests was adopted in connection with the Beta because Albemarle felt it essential for new employees to have a certain level of verbal facility because of the increasing technical nature of the operation and the increasing use of printed instructions in the operation of machinery and the like.

The operations of Albemarle are, like other pulp and

paper mills, organized on a departmental basis. For purposes of employee classification and promotion, each department is organized into one or more lines of progression. Entrance into each department is effected at the bottom of a line of progression and employees move up, depending on their ability and experience, as vacancies occur. In all, Albemarle has 11 separate departments containing 17 lines of progression. Since 1963, applicants for 8 of these departments and 14 of the lines of progression were required to score successfully on the Beta and Wonderlic pre-employment tests.

After the Supreme Court decision in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), Albemarle hired an expert in industrial psychology and testing to conduct a validation study of its pre-employment testing procedures. A validation study determines whether test results have a significant relationship to actual performance on the job. The technique adopted for the validation study of Albemarle's tests was concurrent validation. In concurrent validation, a sample of current employees occupying the jobs, or job groups, in question is selected. These employees are then given the tests, and the test scores compared with one or more criteria of the employee's ability to perform their jobs.

Albemarle's validation study covered 10 job groups in only 8 of the 14 lines of progression, and 5 of the 8 departments for which the tests are required. The sample of employees was generally selected from the higher level jobs and encompassed approximately 30 percent of the different jobs for which tests are required. The test scores from that sample were compared with two supervisors' comparative ratings of employees in each job slot. The criteria for the supervisors' ratings was: "Excluding a man's attitude, just

how well the guy can do the job when he's feeling right." (A. 471). No job analysis was done for the jobs in question.

Albemarle's expert found that one of the tests was validated for 9 of the 10 job groups studied. However, both tests were valid for only one job group.

The effect of the district court's approval of Albemarle's testing procedure is to approve a validation study done without job analysis, to allow Albemarle to require tests for 6 lines of progression where there has been no validation study at all, and to allow Albemarle to require a person to pass two tests for entrance into 7 lines of progression when only one of those tests was validated for that line of progression. We think this was error.

[1] Title VII of the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed. 2d 158 (1971). If an employment practice, though facially neutral as the testing procedures here, is shown to have a differential impact on minority employment, it is prohibited unless the employer can prove business necessity. *Griggs,* at 432, 91 S.Ct. 849. The plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact.[1] It was thus incumbent upon Albemarle to establish business necessity[2] by showing that its testing requirements

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[1] It was demonstrated in plaintiff's exhibits that on the Wonderlic Series 96 percent of whites passed as opposed to 64 percent of blacks. This corresponds with the natural average as determined in a study by the authors of the test. Negro Norms. A Study of 38,452 Job Applicants for Affirmative Action Programs, E. F. Wonderlic & Assoc., Inc. (1970).

[2] "[T]he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business.

"have a manifest relationship to the employment in question." *Griggs,* at 432, 91 S.Ct. at 854. United States v. Jacksonville Terminal Co., 451 F.2d 418, 455-457 (5th Cir. 1971).

While § 703(a)(2), (h)[3] specifically authorizes professionally developed tests not used to discriminate, *Griggs* makes clear that that section allows only those tests proven to be job related. 401 U.S. at 436, 91 S.Ct. 849. In so holding, the Court gave great deference to the interpretation of the Act evinced in a set of guidelines by the enforcing agency, the Equal Employment Opportunity Commission. *Griggs,* at 433-434, 91 S.Ct. 849. We have also recently noted with approval these guidelines. Robinson v. Lorillard Corp., 444 F.2d 791, 798 n. 7 (4th Cir. 1971).

[2] We think Albemarle has failed in several respects to show that its tests are job related, have a manifest relationship to employment, and have been validated in accordance with EEOC guidelines.

In developing criteria of job performance by which to

Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative polices or practices which would better accomplish the business purpose advanced, or accomplished it equally well with a lesser differential impact."
Robinson v. Lorillard Corp., 44 F.2d 791, 798 (4th Cir. 1971). *See also,* Note, Employment Testing: The Aftermath of Griggs v. Duke Power Company, 72 Colum.L.Rev. 900, 908 (1972).

[3] § 703(a)(2), (h) provides in relevant part:

> "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer . . . to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

42 U.S.C.A. § 2000e-2(h).

ascertain the validity of its tests, Albemarle failed to engage in any job analysis. Instead, test results were compared with possibly subjective rating of supervisors who were given a vague standard by which to judge job performance. Other courts have expressed skepticism about the value of such ill-defined supervisor appraisals. *See, e. g.,* Rowe v. General Motors Corp., 457 F.2d 348, 452 (5th Cir. 1972). Also Cooper and Sobol have stated in their article, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1662 (1969):

> Supervisory ratings, for example, which are possibly the single most common performance measure used in validity studies, are subject to personal prejudice. When test scores are correlated with such ratings, the validation, if it can be called that, is of questionable value and may simply prove that the test has the same bias as the supervisors.

Likewise, in this regard the EEOC guidelines provide:

> (3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques the appraisal form(s) and instructions to the rater(s) must be included as part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.
>
> (4) In view of the possibility of bias inherent in subjective evaluation, supervisory rating techniques

> should be carefully developed, and the ratings should be closely examined for evidence of bias.
>
> * * *
>
> 29 C.F.R. § 1607.5(b) (1970).

We agree that some form of job analysis resulting in specific and objective criteria for supervisory ratings is crucial to a proper concurrent validation study. *See,* Western Addition Community Organization v. Alioto, 340 F.Supp. 1351, 1354-1355 (N.D. Cal. 1972). To require less is to leave the job relatedness requirement largely to the good faith of the employer and his supervisors. The complaining class is entitled to more under the Act.

[3] Even if the validation procedures had been proper, it was error to approve the testing procedures for lines of progression where there had been no validation study. In this case the tests were approved as a requirement for 6 lines of progression for which the tests had not been validated. While it is true that a test need not always be validated for each job for which it is required, there are narrow limits on when a test may be used without validation. The EEOC guidelines provide:

> (2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. 29 C.F.R. § 1607.4(c) (1970).

In this case, a failure to perform job analyses in the lines of progression involved in the validation study and in the other lines of progression for which the tests are required

prevents concluding that no significant differences exist in the jobs in question.[4]

Not only was it error to approve the testing procedures for lines of progression not validated, but it was also error to approve requiring applicants to pass two tests for positions where only one test was validated. Albemarle seeks to justify this under the business necessity rule. Albemarle originally hires all employees into a pool. From this pool the employees move into a line of progression as vacancies occur. Since it is not known into which line of progression an employee will be placed, Albemarle asserts there is nothing wrong with requiring all employees to be qualified for any line.

[4] Albemarle has not shown that hiring all employees into a pool is necessary to the safe and efficient operation of

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[4] The appellants also question the validity of the validation study because the employees tested were primarily from higher level, rather than entry level, positions. As pointed out by the EEOC guidelines, 29 C.F.R. § 1607.4(c)(1) (1970), such a validation technique is permissible only where new employees will progress to the higher level "within a reasonable time and in a great majority of cases." As stated by Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1649 (1969):

> In addition, the problems inherent in test use are compounded by the fact that the higher level jobs may not be reached for several years, during which time an employee may improve his capabilities. This possibility seems particulalry likely in the case of an individual whose potential has been artificially suppressed through discrimination, in education and otherwise. In order for a promotability interest to justify test use, therefore, it is essential that the test have been properly evaluated and shown to be predictive of performance at some job level to which promotions can be expected in the reasonable future.

In *Griggs* the Court failed to reach the question of whether a testing procedure which takes into account higher level job requirements is permissible, 401 U.S. at 432, 91 S.Ct. 849. We likewise fail to reach this question because of insufficient evidence below as to the time in which it takes an employee to progress to higher level jobs.

its business, nor has it shown that hiring employees for specific lines of progression is not an acceptable alternative. This they were required to prove to justify their policies under the business necessity test. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971).

Thus we hold that the district court erred in upholding the validity of the pre-employment personnel tests and in refusing to enjoin their use.

II

Back Pay

Title 42 U.S.C. § 2000e-5(g) provides in relevant part:

> The court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

The district court found that Albemarle had practiced discriminatory employment practices and that these practices had been perpetuated through a job seniority system. Consequently, the district court enjoined Albemarle and the defendant union, Halifax Local 425, from continuing the discriminatory practices. Nevertheless, the district court, finding an award of back pay to be within his discretion, refused to award back pay to the complaining class. The reasons given by the district court for refusing such an award were that the claim for back pay was filed nearly five years after the institution of the action, and that there was no evidence of bad faith noncompliance with the Act. Neither of these is sufficient to justify the district court's refusal to award back pay.

In Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), a case which also dealt with a seniority system which perpetuated past discriminatory practices, the defendants made the contentions presented to us here.

> The complaint filed by the plaintiffs in the District Court did not specifically request an award of back pay. . . . At a pretrial hearing concerning the appropriateness of a class action, one of the lawyers for the plaintiffs clearly indicated that the suit was one for injunctive relief rather than recovery of lost wages. It was not until well after trial of the case, though before the judge had entered a decision, that a request was made for additional relief in the form of back pay for the class.

444 F.2d at 802-803. In *Robinson,* as here:

> [B]ecause the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to the suit for injunctive relief . . . . The defendants have in no way been prejudiced by the belated claim.

444 F.2d at 803.

Other courts have held likewise. The Fifth Circuit held, in United States v. Hayes Int'l Corp., 456 F.2d 112 (1972), that the broad aims of Title VII require that the issue of back pay be fully developed and determined even though it was not raised until the post-trial stage of litigation.

Also, the Seventh Circuit, in a case which was not a class action, remanded the case in order that " 'relief should be made available to all who were so damaged whether or not they filed charges and whether or not they joined in the

suit.' " Sprogis v. United States Air Lines, Inc., 444 F.2d 1194, 1202 (7th Cir.), cert. denied, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971).

In *Robinson* the argument was also made that back pay should not be awarded where the defendant had acted in good faith. Put negatively, the argument, urged by Albemarle, is •

> that back pay should not be awarded in the absence of a specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its impostion.

444 F.2d at 804. *See also,* Johnson v. Goodyear Tire & Rubber Co., 349 F.Supp. 3, (S.D.Tex., 1972) (also a seniority case where good faith was present).

The only significant difference between *Robinson* and the present case is that in *Robinson* the district court had awarded back pay and the district court below refused to award back pay. The question then is whether, in light of the broad aims of Title VII, this court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge.

[5] "Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the *purpose for which the power exists.*" Bowles v. Goebel, 151 F.2d 671, 674 (3th

Cir. 1945) (emphasis added). Thus in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 88 L.Ed. 754 (1944). Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. Wirtz v. B. B. Saxon Co., 365 F.2d 457 (5th Cir. 1966) Shultz v. Parke, 413 F.2d 1364 (5th Cir. 1969).

"The clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered by it." Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 720 (7th Cir. 1969). In light of the congressional purpose, courts should give "a wide scope to the act in order to remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities." Rowe v. General Motors Corp., 457 F.2d 348, 354 (5th Cir. 1972).

Also, as we stated in Robinson, "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination." 444 F.2d at 802. See also, Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

[6, 7] Because of the compensatory nature of a back pay award and the strong congressional policy embodied in Title VII, a district court must exercise its discretion as to back pay in the same manner it must exercise discretion as to attorney fees under Title II of the Civil Rights Act. *See Bowe, supra* 416 F.2d at 719. Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render

such an award unjust.[5] Newman v. Piggie Park Enterprises, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968). *See Bowe, supra* 416 F.2d at 719-720.

[8] Because there are no such special circumstances here, on remand the district court should include an award of back pay in its order. It is to be remembered, of course, that a back pay award is limited to damages which are actually suffered. Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971).

Reversed.

Boreman, Senior Circuit Judge (concurring in part and dissenting in part):

I am in agreement with the result reached by Judge Craven in that portion of his opinion which holds that Albemarle Paper Company has failed to show a business relationship between the racially biased tests administered to prospective employees, and its personnel requirements. However, from that portion of his opinion reversing the district court's refusal to award back pay, I must respectfully dissent.

The appellants advance multiple theories in their effort to persuade this court to modify the relief granted below to include an award of back pay. The two arguments approved and adopted by Judge Craven are: first, the equation of § 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), with § 706(k) of the Act. 42 U.S.C. § 2000e-5(k), which provides for an award of attorney's fees in the discretion of the court and under which the

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[5] For examples of such special circumstances said to justify refusal of a back pay award, *see* Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir., June 20, 1972); Le Blanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602, 610-611 (E.D.La.1971), aff'd, per curiam, 460 F.2d 1228 (5th Cir. 1972).

federal courts have held attorney's fees are to be awarded as of course,[1] in the absence of "special circumstances"; and second, that failure to grant back pay was an abuse of discretion under Robinson v. Lorillard, 444 F.2d 791 (4 Cir. 1971).

In Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971), this court, over my strenuous objections stated in dissent, extended the holding of the Supreme Court in Newman v. Piggie Park Enterprises, 390 U.S. 400, 402-403, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), that attorney's fees should ordinarily be granted in suits under Title II of the Act,[2] to include suits under Title VII as well. A study of the relevant sections and the reasoning behind the *Newman* and *Lea* decisions reveals the fallacy of a comparison between the provision for attorney's fees and for back pay.

The pertinent provisions with respect to the allowance of attorneys' fees under Title II and Title VII are virtually identical, and each was considered by Congress as sufficiently significant to be expressed in an individual subsection.[3] However, the grant of authority to award back pay is found in a completely different subsection of Title

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[1] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971).

[2] *Accord,* Wooten v. Moore, 400 F.2d 239, 242 (4th Cir. 1968).

[3] Title II, 42 U.S.C. § 2000a-3(b):

> (b) In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Title VII, 42 U.S.C. § 2000e-5(k):

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

VII, the congressional separation of these two provisions indicating an intent to treat them independently. Furthermore, the subsection in which the provision for back pay is found generally sets out the equitable remedies which the district court may utilize in fashioning relief should the complaining party prevail, indicating no congressional intent to give an award of back pay any greater presumption of appropriateness than its companion remedies.[4]

More significant, however, is the reason for which the district courts' discretion was found to be limited with respect to the award of attorney's fees to prevailing parties plaintiff. In bringing an action against an employer (or manager of a public accommodation under Title II) for discrimination in the operation of his business, the plaintiff is more than a private party litigant; he acts as a "private attorney-general" in vindicating the interests of the public, and it is this advancement of the commonweal that is the basis for allowing attorney's fees as of course.[5] Such a public purpose is not present in the more delicate task of fashioning the appropriate equitable relief to fit the peculiar fact pattern of each case, and the monetary award is intended to redress purely private inequities.[6]

I must conclude, therefore, that the award of back pay, unlike the grant of attorney's fees, is an element of affirm-

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[4] The authorities generally deal with injunctive relief as within the discretion of the district courts. *E. g.* Sprogis v. United Air Lines, 444 F.2d 1194, 1202 (7 Cir. 1971).

[5] Lea v. Cone Mills, 438 F.2d 86, 88 (4 Cir. 1971). *See* Jenkins v. United Gas Corp., 400 F.2d 28, 32 (5 Cir. 1968). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1254 (1971).

[6] *See*, Austin v. Reynolds Metals, 327 F. Supp. 1145, 1153 (E.D. Va.1970).

ative relief which has been entrusted to the more general discretion of the district courts.[7]

Judge Craven's opinion also apparently adopts the view that this court's decision in Robinson v. Lorillard, *supra* stands for the proposition that under facts similar to those in *Robinson,* it would be an abuse of the district court's discretion to deny a request for back pay. Such a construction misinterprets the holding in *Robinson* and the proper scope of appellate review of discretionary decisions. The burden of persuasion falls on the party attempting to show an abuse of discretion and not on the successful party below.[8] In *Robinson* the holding of this court was that the appellant company failed to show, under the factual situation before the district court, that it was an abuse of discretion *to award* back pay, not that back pay was mandated under those circumstances. The term "discretion"[9] denotes that more than one acceptable alternative is available and the choice of the most appropriate is properly left in the hands of the district courts which are more inti-

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[7] *E. g.*, Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006 (9 Cir. 1972); LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972); United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970); Johnson v. Georgia Highway Express, 417 F.2d 1122, 1125 (5th Cir. 1969). Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1265 (1971).

[8] LeBlanc v. Southern Bell Tel. & Tel., 460 F.2d 1228, 1229 (5 Cir. 1972).

[9] The Supreme Court has defined "discretion" as follows:

> The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Langnes v. Green, 282 U.S. 531, 541, 51 S.Ct. 243, 247, 75 L.Ed. 520 (1931).

mately involved with the ambiance of the cases and the merits of each position than are the Courts of Appeal.[10]

> "'*We must keep in mind that the discretion is to be exercised by the district court and not by a court of review. This court should not substitute its discretion for that of the district court.*'" (Emphasis supplied by *Larson.*) Larson v. United States, 296 F.2d 167, 170 (8 Cir. 1961).

The first reason assigned by the district court for its refusal to award back pay—that there was no evidence of bad faith noncompliance with the Act as evidenced by the active recruitment of Negroes into the company's training program for certain skilled lines of progression as early as 1964, the company-initiated merger of some lines of progression to increase advancement opportunities and good faith attempts to validate its testing procedures[11]—is not sufficiently compelling, in and of itself, to support a denial of back pay. In *Robinson* this court made clear that the remedy of back pay is not in the nature of a punishment but is an equitable measure to restore those discriminated

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[10] United States v. Dillon Supply Co., 429 F.2d 800, 804 (4 Cir. 1970):

> The government has urged us to remand with directions to enter specific injunctive relief. After careful consideration we have concluded to deny this request. The fashioning of effective and appropriate injunctive relief depends in part on the discretion of the district court. The function of the courts of appeal is to review the relief which the district court grants in light of findings and the supporting record and to determine if there has been an abuse of discretion.

[11] In 1963 the company discontinued the use of the Bennett Mechanical Comprehension Test, which is regarded to be racially biased (See Cooper and Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598, 1641 n. 16 (1969)) in favor of Wonderlic A & B tests.

against to their proper economic position had the complained of actions not occurred.[12] This is not to say, however, that the good faith of the company may never be taken into account in considering and determining the proper relief to be granted.[13] Should there exist equitable factors of which the district court may properly take cognizance, and which are supportive of a decision to deny back pay, then innocence and good faith efforts on the part of the employer may be factors to be weighed in the balancing of equities.

Some insight into the proper application of that equitable balancing power may be gained from an examination of the third argument advanced by the appellants, a comparison of § 706(g) with § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c). In the case of Phelps Dodge v. N.L.R.B., 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), which was decided under § 10(c), the Labor Board had ordered reinstatement of a discriminatorily discharged employee together with a full award of back pay, although the employee had not earned wages during the period of his lay-off. In remanding to the Board for modification in light of the principle of mitigation of damages, the Supreme Court stated:

> [T]he advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to

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[12] 444 F.2d 791 at 802, 804.

[13] *See,* Schaeffer v. San Diego Yellow Cabs, 462 F.2d 1002, 1006-1007 (9 Cir. 1972).

> the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. (313 U.S. at 198, 61 S.Ct. at 854.)

The primary factor given by the district court in the instant case was prejudice to the interests of the company arising from representations made by the appellants in their status as plaintiffs below. During the early stages of this case, the company moved for Summary Judgment and in replying to that motion,[14] the plaintiffs set out the limits of the relief sought:

> It is important to understand the exact nature of the class relief sought by plaintiffs. No money damages are sought for any member of the class not before the court, nor is specific relief in the way of job changes, promotions or the like being sought for any member of the class not before the court. The only relief sought for the class as a whole is that defendants be enjoined from treating the class as a separate group and discriminating against the class as a whole in the future. . . .
>
> * * *
>
> [T]he matter of specific individual relief for other class members is not before this Court.

Judge Craven in the majority opinion erroneously characterizes the prayer for back pay as merely a tardy request, when as illustrated above, it in fact was a reversal of ex-

[14] The answer was filed on November 22, 1966.

press representations made three and one-half years prior to the request for additional relief.[15] This situation is plainly distinguishable from *Robinson,* in which the oral representation by counsel for the plaintiffs that no monetary relief was sought was made at pre-trial conference. The prejudice to Albemarle stemmed not from a failure of defenses, with which this court was concerned in *Robinson,* but from the unconscionably long delay between the express disclaimer and the unindicated, abrupt reversal of position.

Rule 54(c), Federal Rules of Civil Procedure, provides that the federal courts "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings," but this is not the ordinary case of a mere failure to request a specific form of relief; here there was an express and formal disclaimer of intention to seek that particular remedy. An opposing party should be permitted to rely on such a statement, and to the extent that in relying thereon he has acted to his detriment,[16] Rule 54(c) does not mandate the grant of the contested award.[17]

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[15] The request was first communicated to the company on June 4, 1970.

[16] Illustrations of the detriment arising from the reliance of the defendants upon the express disclaimer by the plaintiffs of their intention to seek back pay for members of the class generally, were argued before the district court at pretrial conferences: (1) The extensive period of time taken for prosecution of the suit exposed the defendants to the unexpected hazard of a potentially enormous award, unavailable for consideration during their continued efforts to arrive at a settlement, and which threatened the financial viability of the defendant paper mill. (2) During the hiatus with respect to the back pay claim, the paper mill was sold by the defendant Ethyl Corp. to the defendant Hoerner-Waldorf Corp., with the transfer agreement taking express notice of the pendency of suit, a strong indication of the impact the status of that suit had upon the deliberations of the principals. (3) The inordinately long delay tended to preclude the

More importantly, Rule 54(c) is merely the vehicle by which the party is to obtain the "relief to which he is entitled." The relief and the entitlement thereto are to be determined by the district court under § 706(g), and Rule 54(c) cannot compel the grant of relief which is within the discretion of the district court. The court below did not base its refusal to award back pay on the failure to request such relief pursuant to Rule 8(a). F.R.Civ.P., but by virtue of its discretionary powers under § 706(g); the source of the claim of authority for granting the award sought is the very source relied upon by the court below to deny the request.

I do not find it possible to say that the reasons assigned by the district court in support of its decision not to award back pay show an abuse of discretion, and I would therefore affirm the decision below. Under the circumstances here I would not be willing, in any event, to go beyond a direction to the district court to investigate the propriety of awarding back pay with respect to those named plaintiffs actually before the court since the representations of the appellants in their Memorandum in Opposition to Summary Judgment explicitly indicate an intent to seek affirmative, individual monetary relief only for themselves, a relatively small group, and for no others.

ALBERT V. BRYAN, Senior Circuit Judge (dissenting in part, and concurring in part):

I would affirm the District Court's refusal to enjoin the employee testing practices of Albemarle Paper Com-

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defendants from adequately preparing a defense to individual claims, due to the impossibility or impracticality of deposing witnesses and claimants nearly five years after the occurrences of events of which plaintiffs complain.

[17] Rental Development Corp. v. Lavery, 304 F.2d 839, 842 (9 Cir. 1962).

pany. However, I would reverse for its deprival of the employees of an opportunity to recover back pay, if any, lost by reason of the practice of fixing seniority on a job instead of a plant basis.

One cannot read the District Judge's opinion without being impressed by its thoroughness, completeness and fairness. Overall, save for the disallowance of back pay just mentioned, I think the opinion honors the dictates of the Civil Rights Act of 1964 and squares with the exactions of the Act as expounded in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

While Judge Craven's recitation of the facts is altogether accurate, I would add this synopsis. A full appraisal of the Court's ruling calls for review of the steps taken by Albemarle to meet the statute's demands. Before the effective date of the Civil Rights Act of 1964, Albemarle commenced recruitment of black applicants from the nearby high schools for participation in the company's apprentice program. It also sought applications from among its black employees.

Following *Griggs,* Albemarle conducted validation studies of its testing requirements. To this end an acknowledged expert in such matters was retained. He gauged his study by the manual, among others, issued August 1, 1970 by the Equal Employment Opportunity Commission, entitled "Guidelines of Employee Selection Procedures." Pursuant to his directions each employee was given three well-known tests, the Wonderlic, Forms A and B, and the Beta. The tests purported to show the employee's capability to do the work assigned him. His performance was thereafter rated twice by two different supervisors, who made independent evaluations without knowledge of his test scores.

The test results and job ratings were sent to Purdue

University for statistical correlation. The District Judge found:

> "35. The results of the validation study, presented both in statistical and graphical form, showed positive correlations of a statistically significant nature for nine of the ten specific job groupings . . . ."

The expert advised that "the company utilize these tests for its initial hiring," observing, however, that "no test or set of tests will validate for all jobs." With this evidence in mind, I look to the errors ascribed in Judge Craven's opinion to the District Court's refusal to direct Albemarle to abolish or change its testing procedures.

I. First, I cannot agree that the employer did not validate the tests and relate them to the jobs in *all* the lines of skilled employment. The District Judge found otherwise, saying: "The group tested was typical of employees in the skilled lines of progression." This, for me, is a conclusion that the groups tested fairly exemplified the remaining groups and also fairly represented the qualifications existing in *all* the skilled lines. This reading of his factual findings is reinforced by his later statement: The *personnel* tests administered at the plant have undergone validation studies and *have been proven* to be job related." (Accent added.) This statement, I understand, encompasses all the groups at the plant, whether tested directly or by sample. Such a method of testing in a multiunit organization is, as noted by Judge Craven, approved by the Guidelines of Employee Selection Procedures, supra, § 1607.5.

The breadth of the expert's survey is described in his report as follows:

> "General Summary:

> "Inspection of the correlations and charts shown in this report shows quite conclusively that both the Beta and Wonderlic A tests *can be reasonably used for both hiring and promotion for most of the jobs in this mill.* . . . The EEOC could not reasonably object to these standards in the light [of] the validation data covered in this report." (Accent added.)

Secondly, in view of the findings by the Court that validation studies had been applied to the personnel tests and that the tests had been proved to be job related, I cannot join in the determination that discrimination resulted from the absence of "job analyses." It seems to me that these findings necessarily recognize that the equivalent of "job analysis" was utilized. In rating the employees, the jobs' features were undeniably considered, for the supervisors were unquestionably familiar with these elements.

Thirdly, also unwarranted, it seems to me, is criticism of the District Court's acceptance of the company's practice of "requiring applicants to pass two tests for positions where only one test was validated." The two are the Beta and Wonderlic. Beta (non-language) measures merely native intelligence, while Wonderlic (verbal) tests reading ability. The District Court justifies its approval of Albemarle's utilizing both tests because it was a business necessity. The Court found that the complexity of Albemarle's newly adopted machinery made reading an absolute requirement for the safe and efficient operation of the machines and called for employees "with a high level of native intelligence." A personal inspection of the machinery revealed the intricacy to the judge.

Each of these aptitude tests is "demonstrably a reasonable measure of job performance." *Griggs,* at 436, 91 S.Ct. at 856. Thus they are their own proof of their validation. My

understanding is that a test cannot be declared discriminative if it searches for an indispensable factor of a job. *Griggs,* supra, at 431, 91 S.Ct. 849.

It does not appear from the District Judge's findings that low scores on one or both tests would bar all applicants for employment. Decisions on employment in non-technical areas are apparently not made solely upon test results, but include such considerations as experience, references and interviews.

In my judgment the District Judge, in regard to the testing requirements, exercised a cautious solicitude, both for the employees' entitlements and the employer's obligations under the Civil Rights Act of 1964. His injunction against a high school education as a job prerequisite and against the use of job seniority instead of plant seniority removed the employees' sustainable grievances. Ten days were devoted to the hearing of the case—July 26 to August 5, 1971. With this industry and application, along with the knowledge of the rigors of *Griggs,* as well as of the EEOC guidelines, the District Judge did not, to my mind, omit or deviate in any significant degree from the Act. It must be remembered, throughout, that the three items of the District Judge's determination just enumerated constitute findings of fact, and I cannot say they are clearly erroneous.

II. Lastly, recovery was asked by the plaintiffs for "the amount of pay which would have accrued to the employees had there been no unlawful practice." Under the Act, 42 U.S.C. § 2000e-5(g), back pay may be ordered in accompaniment of an injunction—and only then— against an employer who has engaged in "an unlawful employment practice" and has done so "intentionally."

As Judge Craven notes, the District Court found that "Albemarle has practiced racially discriminatory employ-

ment . . . prior to July 2, 1965 and that the effect of this discrimination had been perpetuated through a job seniority system." Accordingly the Court issued an injunction, pursuant to the Act, against the maintenance of this discrimination, terming it "an unlawful employment practice" and concluding that it had been committed "intentionally." No objection was made by the employer to this finding and conclusion, and no appeal taken from the injunctive order. Indeed, in the oral argument of the appeal the appellee-defendants conceded that the District Judge had indeed stated this conclusion on "intentionally."

For this reason I think back pay lost by an employee through the company's resort to job-seniority should be recovered. Of course, the reimbursable loss must be proved to be the direct result of the invidious practice and, as Judge Craven admonishes, the grant of monetary relief is not to exceed the "damages which are actually suffered."

Conclusion

In sum, as set for in Part I hereof, I dissent from Part I of Judge Craven's opinion; but I concur with the award, in his Part II, of back pay insofar as it is granted for loss occasioned by the job seniority practice, as explained in my Part II.

APPENDIX C

42 U.S.C. §§ 2000e-2(a), 2000e-2(h) AND 2000e-5(g)

42 U.S.C. § 2000e-2(a)

APPENDIX C

42 U.S.C. §§ 2000e-2(a), 2000e-2(h) AND 2000e-5(g)

42 U.S.C. § 2000e-2(a)

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

42 U.S.C. § 2000e-2(h)

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be unlawful employment practice for an employer to give and to act upon the

results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or use to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 U.S.C. § 2000e-5(g)

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admis-

sion, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-1267

Joseph P. Moody, et al.,

Appellants,

v.

Albemarle Paper Company, et al.,

Appellees.

ORDER
Filed July 22, 1974

It appearing from the decision of the Supreme Court in Moody v. Albemarle Paper Co., ... U.S. ....., 42 L.W. 3689 (June 17, 1974) (per curiam), that the order heretofore entered on June 25, 1973, setting this case for rehearing in banc, was improvidently entered, in that only active circuit judges were entitled to vote in the poll on the suggestion for rehearing in banc and a majority of the active circuit judges voted against rehearing in banc;

Accordingly, it is ORDERED that said order of June 25, 1973 be, and it is hereby, rescinded, and the petitions for rehearing and rehearing in banc be, and they are hereby, denied.

/s/ Clement F. Haynsworth, Jr.
Chief Judge